Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd

FEDERAL COURT (KOTA KINABALU) — CIVIL APPEAL NO 02–423 OF 1994
EUSOFF CHIN CHIEF JUSTICE, EDGAR JOSEPH JR AND WAN YAHYA PAWAN TEH FCJJ
11 APRIL 1996

Land law *— Indefeasibility of title and interests — Sabah Land Ordinance (Cap 68) — Registration — Whether system of land tenure in Sabah based on Torrens system of land registration — Whether Land Ordinance confers indefeasibility of title or interest in land on registration — Sabah Land Ordinance (Cap 68) Ch V & s 88*

Land law *— Sale of land — Beneficial ownership — Purchaser paid price in full — Vendor had not given purchaser a duly executed, valid and registrable transfer of land — Whether vendor had divested himself of his interests in land — Whether vendor bare trustee of property for purchaser — Whether purchaser had derived beneficial ownership — Whether trusteeship operated retrospectively by conversion to date contract was made on date of completion*

Land law *— Charge — Priority — Developer sold land to purchaser — Developer then charged land to finance company for loan — Charge registered in favour of finance company after sale of land — Purchaser paid purchase price in full — Developer defaulted — Land sold pursuant to order for sale — Whether developer a bare trustee of purchaser — Whether charge null and void — Sabah Land Ordinance (Cap 68) Ch V, ss 88 & 104*

In March 1982, United Lands Development Sdn Bhd ('the developer') applied to the appellant ('the finance company') for a bridging loan ('the loan') to finance its industrial development project on four pieces of land in Sabah. By a sale and purchase agreement dated 2 November 1982 ('the agreement') entered into between the respondent ('the purchaser') and the developer, the purchaser agreed to purchase from the developer an industrial building to be built on one of the lands ('the property'). On 28 May 1983, the developer created a charge over the lands ('the charge') duly registered under s 104 of the Sabah Land Ordinance (Cap 68) ('the Land Ordinance') in favour of the finance company to secure the repayment of the loan. By 23 May 1986, the purchaser had paid the full purchase price thereby effecting completion of the contract of sale on that date. The developer later defaulted in repayment of the loan, and the finance company commenced proceedings to enforce the charge. Consequently, on 17 August 1991, an order for sale was made, and on 30 November 1991, the property was sold to Karamunsing Jaya Sdn Bhd ('the purchaser of the judicial sale'), and a certificate of sale dated 26 February 1992 was duly issued. On 7 December 1991, the purchaser commenced proceedings by way of originating summons seeking, inter alia, declarations that: (i) the developer was a bare trustee for the purchaser in connection with the sale of the property

by virtue of the agreement; (ii) the finance company's charge before the subdivision over the four pieces of land, as far as the property which now had a sub-divided title was concerned, was null and void on the ground that the developer no longer had any chargeable interest over the property to create a valid charge in favour of the finance company, so that any foreclosure actions taken by the finance company over the property was wrongful; alternatively (iii) the finance company's charge was subject to the purchaser's prior equitable interest over the property acquired by the purchaser by way of the purchase of the property from the developer prior to the execution and registration of the finance company's charge; and (iv) any foreclosure action resulting in a sale by the finance company over the property was subject to the purchaser's prior equitable interest over the property. On 25 April 1994, the judge pronounced judgment in favour of the purchaser. It was held that the developer had become a bare trustee of the property for the purchaser on receipt of the full purchase price, and that the trusteeship operated 'retrospectively by conversion to the date when the contract [was] made', ie 2 November 1982. The finance company appealed.

Held, allowing the appeal:

(1) The Land Ordinance is not modelled on the Torrens system of land registration. It does not have provisions conferring indefeasibility of title to or interests in land on registration which is a feature of central importance to the Torrens system. However, Ch V, particularly s 88, of the Land Ordinance does imply the basic Torrens concept that title to or interest in land vests and divests only on registration. Thus, the Land Ordinance provides for a modified Torrens system of land registration (see p 26C–D); *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200 followed.

(2) It followed that the Peninsular Malaysia cases with their emphasis on the indefeasibility of a chargee's registered title guaranteed by s 340 of the National Land Code 1965 were of no direct relevance to the issues which arose for decision in the present appeal. The correct approach to adopt in considering the priority dispute in this appeal was to apply general law priority rules, not forgetting s 88 of the Land Ordinance and the concept of the bare trust doctrine in a vendor/purchaser situation (see p 26F–I).

(3) The contractual events which result in the vendor becoming a bare trustee of the land for the purchaser, is on completion of the sale and purchase agreement, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land (see p 29E–F).

(4) It is not a correct description of the relationship between the parties of a contract of sale and purchase of land to say that from

the time the contract was concluded, the vendor is a trustee for the purchaser because, at that stage, they are only parties to a contract of sale and purchase which a court may, in certain circumstances, decree specific performance (see p 29G) *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* [1995] 3 MLJ 211 overruled.

(5) The proposition that 'on the date of completion, if the vendor becomes a bare trustee, the trusteeship operates retrospectively by conversion to the date when the contract was made' could not be applied universally because it could cause considerable difficulties in the workings of the Torrens, or a modified Torrens, system of land registration contained in a codifying enactment (see p 29H–I); *Chang & Anor v Registrar of Titles* (1976) 8 ALR 285 followed.

(6) Given the circumstances of the present case, no court would grant specific performance of the agreement. The trustee/beneficiary relationship would not be applied in a vendor/purchaser situation where the contract of sale and purchase is not one which a court would grant specific performance (see p 30 C–D).

(7) At the time the finance company's charge was created and registered, the developer was not yet a trustee of the purchaser under the agreement. Consequently, any suggestion that the charge thus created was null and void was devoid of any legal basis (see p 31D–E).

(8) The appeal was also bound to succeed on a further ground. Before judgment was pronounced on 25 April 1994, the interest of the purchaser of the judicial sale had intervened. A certificate of sale had been issued in its favour, and it was a purchaser in good faith for valuable consideration and without notice of the circumstances alleged to render the finance company's title defeasible (see p 32B).

(9) Section 12 of the Housing (Control and Licensing of Developers) Enactment 1978 of Sabah provides that every contract of sale shall contain a provision binding on the licensed housing developer to the effect that immediately after a contract of sale has been signed the developer shall not subject the land sold to the purchaser to any incumbrance without the prior approval of the purchaser. However, the agreement did not contain such provision. But it would be wrong to assume that had the purchaser advanced a submission based on s 12, it was bound to have succeeded. This was because had it done so, most probably, the evidence would not be the same (see p 32D–I).

Obiter dicta:

Assuming that completion under the agreement and handing over by the developer to the purchaser of a duly executed, valid and registrable transfer of the property had preceded the creation of the charge, it

would still have been clearly wrong in law to decide the priority dispute in favour of the purchaser under the agreement. To reiterate, Ch V of the Land Ordinance implies the basic Torrens concept that the title to or interest in land vests and divests only on registration. The doctrine of constructive notice is inapplicable to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration (see p 31F); *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 followed.

Per curiam:

In law, there is no requirement that prior to the creation of a charge over land which is intended for development and sub-divided into lots for sale to the public, a chargee is under an obligation to ascertain that the lots have not been sold or that they are not the subject of sale and purchase agreements executed by a chargor as vendor. Such an omission, even though might constitute negligence, would not constitute fraud within s 340(2)(a) of the National Land Code 1965 (see p 33C); *Lai Soon Cheong v Kien Loong Housing Development Sdn Bhd & Anor* [1993] 2 CLJ 199 followed.

[Bahasa Malaysia summary

Dalam bulan Mac 1982, United Lands Development Sdn Bhd ('pemaju') telah memohon kepada perayu ('syarikat kewangan') untuk satu pinjaman 'bridging' ('pinjaman tersebut') bagi membiayai projek kemajuan perindustrian atas empat bidang tanah di Sabah. Melalui suatu perjanjian jual-beli bertarikh 2 November 1982 ('perjanjian tersebut') yang diikat di antara penentang ('pembeli') dan pemaju, pembeli bersetuju membeli sebuah bangunan perindustrian daripada pemaju yang akan dibina atas satu daripada empat bidang tanah itu ('hartanah tersebut'). Pada 28 Mei 1983, pemaju telah mewujudkan satu gadaian ke atas tanah-tanah itu ('gadaian tersebut') didaftarkan seperti yang sepatutnya di bawah s 104 Ordinan Tanah Sabah (Bab 68) ('Ordinan Tanah') yang memihak kepada syarikat kewangan bagi menjamin pembayaran balik pinjaman itu. Pada 23 Mei 1986, pembeli telah membayar harga belian penuh lalu melaksanakan penyempurnaan kontrak jualan pada tarikh itu. Pemaju kemudiannya telah ingkar dalam pembayaran balik pinjaman itu, dan syarikat kewangan memulakan prosiding untuk menguatkuasakan gadaian itu. Selepas itu, pada 17 Ogos 1991, satu perintah jualan telah dibuat dan pada 30 November 1991, hartanah tersebut dijual kepada Karamunsing Jaya Sdn Bhd ('pembeli jualan kehakiman') dan satu sijil jualan bertarikh 26 Februari 1992 dikeluarkan. Pada 7 Disember 1991, pembeli memulakan prosiding melalui saman pemula meminta, antara lain, deklarasi bahawa: (i) pemaju adalah pemegang amanah namaan untuk pembeli berkaitan dengan jualan harta tanah tersebut menerusi perjanjian tersebut; (ii) gadaian syarikat kewangan sebelum pecah-sempadan ke atas empat bidang tanah itu, setakat berhubung dengan hartanah tersebut yang kini sudah pun mempunyai hakmilik

memecah sempadan, adalah batal dan tak sah atas alasan bahawa pemaju tidak lagi mempunyai sebarang kepentingan boleh gadai atas hartanah tersebut bagi mewujudkan satu gadaian sah yang memihak kepada syarikat kewangan, supaya apa-apa tindakan penutupan yang diambil oleh syarikat kewangan ke atas hartanah tersebut adalah salah; secara alternatif (iii) gadaian syarikat kewangan adalah tertakluk kepada kepentingan ekuiti terdahulu pembeli ke atas tanah itu yang diperolehi oleh pembeli melalui pembelian hartanah tersebut daripada pemaju sebelum penyempurnaan dan pendaftaran gadaian syarikat kewangan; dan (iv) sebarang tindakan penutupan yang mengakibatkan satu jualan oleh syarikat kewangan atas hartanah tersebut adalah tertakluk kepada kepentingan ekuiti terdahulu pembeli atas hartanah tersebut. Pada 25 April 1994, hakim telah membuat keputusan yang memihak kepada pembeli. Adalah diputuskan bahawa pemaju telah menjadi pemegang amanah namaan hartanah tersebut untuk pembeli pada penerimaan harga belian penuh, dan bahawa peramanahan beroperasi 'secara kebelakangan melalui penukaran kepada tarikh apabila kontrak itu [telah] dibuat', iaitu pada 2 November 1982. Syarikat kewangan merayu.

Diputuskan, membenarkan rayuan:

(1) Ordinan Tanah tersebut bukan diasaskan atas sistem pendaftaran tanah Torrens. Ia tidak mempunyai peruntukan yang memberikan hakmilik atau kepentingan dalam tanah ketakbolehan disangkal hakmilik atas pendaftaran yang merupakan suatu ciri yang terpenting dalam sistem Torrens. Walau bagaimanapun, Bab V, khususnya s 88, Ordinan Tanah tersebut sesungguhnya membayangkan konsep Torrens yang asas bahawa hakmilik kepada atau kepentingan dalam tanah diletakkan atau dilucutkan hanya atas pendaftaran. Oleh itu, Ordinan Tanah tersebut memperuntukkan suatu sistem Torrens pendaftaran tanah yang telah diubahsuai (lihat ms 26C–D); *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200 diikut.

(2) Dengan itu, kes-kes Semenanjung Malaysia yang menekankan hakmilik berdaftar pemegang gadaian ketakbolehan disangkal, yang dijamin oleh s 340 Kanun Tanah Negara 1965 tidak relevan secara langsung terhadap isu yang timbul untuk diputuskan dalam rayuan ini. Pendekatan yang betul untuk digunakan dalam pertimbangan pertikaian keutamaan dalam rayuan ini ialah dengan menggunakan peraturan keutamaan undang-undang am, dan dengan mengambil kira s 88 Ordinan Tanah tersebut dan konsep doktrin 'bare trust' dalam keadaan penjual/pembeli (lihat ms 26F–I).

(3) Kejadian kontraktual yang menyebabkan penjual menjadi suatu pemegang namaan tanah untuk pembeli, adalah atas penyelesaian perjanjian jual-beli, iaitu, apabila penjual menerima harga belian dengan sepenuhnya, yang dibayar pada masa yang tepat dan apabila penjual telah memberikan pembeli suatu pindahmilik

dalam bentuk wajar, telah disempurnakan, sah dan boleh didaftarkan, yang memihak kepada pembeli, kerana pada masa itulah penjual telah melucutkan kepentingannya dalam tanah yang berkenaan (lihat ms 29E–F).

(4) Ia bukan merupakan suatu penggambaran perhubungan antara pihak-pihak dalam suatu kontrak jual beli yang betul, jika dikatakan bahawa dari masa kontrak telah disempurnakan, penjual ialah pemegang amanah untuk pembeli, kerana pada tahap itu, mereka hanya merupakan pihak-pihak dalam kontrak jual-beli, yang mahkamah boleh, dalam keadaan yang tertentu, mendekrikan pelaksanaan spesifik (lihat ms 29G) *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* [1995] 3 MLJ 211 ditolak.

(5) Kenyataan bahawa 'pada tarikh penyelesaian, jika penjual menjadi suatu 'bare trustee', peramanahan beroperasi secara kebelakangan dengan penukaran ke tarikh apabila kontrak telah dibuat' tidak boleh dipakai secara sejagat kerana ia boleh menyebabkan banyak kesusahan dalam perjalanan sistem pendaftaran tanah Torrens, atau Torrens yang telah diubahsuai, yang terkandung dalam suatu enakmen yang telah dikanunkan (lihat ms 29H–I); *Chang & Anor v Registrar of Titles* (1976) 8 ALR 285 diikut.

(6) Memandangkan keadaan kes ini, tidak ada mahkamah yang akan memberikan pelaksanaan spesifik perjanjian tersebut. Perhubungan pemegang amanah/benefisiari tidak terpakai dalam keadaan penjual/pembeli di mana kontrak jual-beli yang berkenaan bukan merupakan suatu kontrak yang mahkamah akan memberikan pelaksanaan spesifik (lihat ms 30 C–D).

(7) Pada masa gadaian syarikat kewangan diwujud dan didaftarkan, pemaju bukan lagi merupakan pemegang amanah pembeli di bawah perjanjian tersebut. Dengan itu, sebarang cadangan bahawa gadaian yang telah diwujud itu adalah batal dan tak sah adalah kekurangan sebarang dasar undang-undang (lihat ms 31D–E).

(8) Rayuan semestinya akan berjaya atas suatu alasan yang selanjutnya. Sebelum penghakiman bertarikh 25 April 1994 diberikan, kepentingan pembeli jualan kehakiman telah mencelah. Suatu perakuan jualan yang memihak kepadanya telah dikeluarkan, dan ia merupakan suatu pembeli yang suci hati untuk balasan yang bernilai dan tanpa notis keadaan yang dikatakan telah menyebabkan hakmilik syarikat kewangan tersebut boleh disangkal (lihat ms 32B).

(9) Seksyen 12 Enakmen Perumahan (Kawalan dan Perlesenan Pemaju) 1978 [Housing (Control and Licensing of Developers) Enactment 1978] Sabah memperuntukkan bahawa setiap kontrak jualan harus mengandungi suatu peruntukan yang mengikat atas pemaju perumahan yang berlesen, yang membawa kesan bahawa selepas sahaja suatu kontrak jualan telah ditandatangani pemaju tidak boleh menaklukkan tanah yang telah dijual kepada pembeli

kepada sebarang bebanan tanpa kebenaran pembeli terlebih dahulu. Walau bagaimanapun, perjanjian tersebut tidak mengandungi peruntukan tersbeut. Tetapi adalah salah jika dianggap jika pembeli telah mengemukakan suatu hujahan berdasarkan s 12, ia semestinya akan berjaya. Ini adalah kerana jika ia telah berbuat demikian, besar kemungkinan keterangan akan menjadi tidak serupa (lihat ms 32D–I) .

Obiter dicta:

Dengan menganggap bahawa penyelesaian di bawah perjanjian tersebut dan penyerahan daripada pemaju kepada pembeli suatu pindamilik hartanah yang telah disempurnakan, sah dan boleh didaftarkan telah mendahului kewujudan gadaian, ia masih adalah salah di sisi undang-undang untuk memutuskan pertikaian keutamaan ini dengan memihak kepada pembeli di bawah perjanjian tersebut. Sebagai ulangan, Bab V Ordinan Tanah tersebut membayangkan konsep Torrens yang asas bahawa hakmilik kepada atau kepentingan dalam tanah diletakkan atau dilucutkan hanya atas pendaftaran. Doktrin notis konstruktif adalah tidak terpakai dalam sistem pendaftaran terhadap urusniaga di mana keutamaan dan notis adalah ditentukan oleh keutamaan dalam atau fakta pendaftaran (lihat ms 31F); *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 diikut.

Per curiam:

Mengikut undang-undang, tidak terdapat syarat bahawa sebelum perwujudan gadaian atas tanah yang dimaksudkan untuk kemajuan dan dipecah-bahagi kepada lot untuk dijual kepada awam, seorang pemegang gadaian adalah di bawah suatu kewajipan untuk menentukan bahawa lot belum lagi dijual atau bahawa mereka bukan subjek perjanjian jual beli yang disempurnakan oleh penggadai sebagai penjual. Peninggalan sedemikian, walaupun mungkin merupakan kecuaian, tidak merupakan fraud dalam maksud s 340(2)(a) Kanun Tanah Negara 1965 (lihat ms 33C); *Lai Soon Cheong v Kien Loong Housing Development Sdn Bhd & Anor* [1993] 2 CLJ 199 diikut.]

Notes

For cases on beneficial ownership in sale of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2472–2474.

For cases on indefeasibility of title and interests, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1837–1896.

For cases on priorities of charges over land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1508–1509, 2189–2211.

Cases referred to

Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd [1995] 3 MLJ 211

Buxton & Anor v Supreme Finance (M) Bhd [1992] 2 MLJ 481

Chang & Anor v Registrar of Titles (1976) 8 ALR 285

A *Chin Choy & Ors v Collector of Stamp Duties* [1981] 2 MLJ 47
Chua Chee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85
Hon Ho Wah & Anor v United Malayan Banking Corp Bhd [1994] 2 MLJ 393
B *Howard v Miller* [1915] AC 318
Inter-Continental Mining Co Sdn Bhd v Societe des Etains de Bayas Tudjuh [1974] 1 MLJ 145
J Raju v Kwong Yik Bank Bhd & Anor [1994] 2 MLJ 408
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116
C *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457
Lai Soon Cheong v Kien Loong Housing Development Sdn Bhd & Anor [1993] 2 CLJ 199
Lin Nyuk Chan v Wong Sz Tsin [1964] MLJ 200
D *Lysaght v Edwards* (1875–76) 2 Ch D 499
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224
Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149
E *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54
Rayner v Preston (1881) 18 Ch D 1
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81
F *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614

G **Legislation referred to**

Civil Law Act 1956 (Revised – 1972) s 6
Housing (Control and Licensing of Developers) Enactment 1978 s 12
Housing Developers (Control and Licensing) Rules 1970 r 12(1)(b)
Housing Developers (Control and Licensing) Regulations 1982
H reg 12(1)(b)
National Land Code 1965 ss 92(1), 340(2)(a), (3)
Sabah Land Ordinance (Cap 68) ss 6, 88, 104, 116
Sarawak Land Code (Cap 81) s 131

I **Appeal from**: Originating Summons No K116 of 1991 (High Court, Kota Kinabalu)

Norbert Yapp (*Jayasuriya Kah & Co*) for the appellant.
Lim Pitt Kong (*PK Lim & Co*) for the respondent.

Edgar Joseph Jr FCJ (delivering the grounds of judgment of the court): This was an appeal from the judgment of the High Court at Kota Kinabalu, Sabah arising from a priority dispute concerning certain immovable properties. The contest was between a chargee under a charge registered in the form prescribed under s 104 of the Sabah Land Ordinance (Cap 68) ('the Land Ordinance') and a purchaser under an agreement of sale and purchase in writing of a single unit, being a proposed two-storey light industrial building, to be built on one of the four pieces of land, the subject matter of the charge.

The essential facts which led up to the litigation, the subject of this appeal, may be shortly stated.

On or about 1 March 1982, United Lands Development Sdn Bhd ('the developer chargor') had applied to Borneo Housing Mortgage Finance Bhd ('the finance company chargee') for a bridging loan of RM15,000,000 to finance the development of its proposed industrial development project on certain lands situated in the state of Sabah, comprised in Country Leases Nos 015271360, 015271388, 015087117 and 015271388 ('the project lands').

By a sale and purchase agreement in writing dated 2 November 1982 entered into by Time Engineering Bhd ('the purchaser under the agreement') and the developer chargor, the former had agreed to buy from the latter a single unit, being a proposed industrial building to be built on the project lands identified as Lot No 6, Block A, Kolombong Industrial Development, to wit, a two-storey light industrial building to be erected on one of the project lands, later comprised in Country Lease No 015454967 ('the disputed property') for a consideration of RM295,000.

Upon execution of the sale and purchase agreement, that is to say, on 2 November 1982, the purchaser under the agreement had paid a sum of RM29,500 to the developer chargor by way of a 10% deposit to account of the purchase price aforesaid, having previously paid a booking fee equivalent to 5% of the purchase price.

On 28 May 1983, the developer chargor had created a charge over the project lands duly registered under s 104 of the Land Ordinance on 21 June 1983 ('the charge') in favour of the finance company chargee to secure the repayment of the bridging loan of RM15,000,000 aforesaid.

By 23 May 1986, the purchaser under the agreement had made due payment of the entire purchase price so that completion had been effected on that date.

Unfortunately for the purchaser under the agreement, the developer chargor had committed default in repayment of the bridging loan and thereby committed a breach of the provisions of the charge, which led to the finance company chargee commencing proceedings under the Land Ordinance to enforce the charge and which in turn led to the Assistant Collector of Land Revenue, Kota Kinabalu making an order for sale on 17 August 1991, pursuant to which the disputed property was sold to Karamusing Jaya Sdn Bhd ('the purchaser at the judicial sale') at a price

of RM180,000 at a public auction sale held on 30 November 1991, in consequence of which a certificate of sale dated 26 February 1992 was duly issued.

Then, on 7 December 1991, the purchaser under the agreement as plaintiff had commenced proceedings by way of originating summons citing the developer chargor, the finance company chargee, the Assistant Collector of Land Revenue, Kota Kinabalu, and the purchaser at the judicial sale as the first, second, third and fourth defendants respectively, praying for the following reliefs:

1 A declaration that as between the plaintiff and the first defendant, the first defendant is a bare trustee for the plaintiff in connection with the sale of Lot No 6, Block A, Kolombong Industrial Development together with a two-storey light industrial building erected thereon or otherwise now known as Country Lease No 015454967 (hereinafter referred to as 'the said property') by virtue of a written agreement dated 2 November 1982 with effect from 2 November 1982.

2 A declaration that as between the plaintiff and the second defendant, the second defendant's charge over four (4) pieces of land comprised in Country Lease Nos 015087117, 015023515, 015271360 and 015271388 dated 21 June 1983 and registered with the Lands and Surveys Department, Kota Kinabalu under Memorial No 10196094 before the sub-division of the said lands of which the said property (CL No 015454967) forms one of the sub-divided titles after the sale of the said property to the plaintiff by the first defendant, to the extent of the said property only is null and void or invalid on the ground that the first defendant no longer has any chargeable interest or otherwise in or over the said property (then undivided) to create a valid charge over the same in favour of the second defendant so that any foreclosure actions taken by the second defendant over the said property is wrongful as being devoid of any basis.

3 Alternatively, a declaration that as between the plaintiff and the second defendant, the second defendant's charge aforesaid is subject to the plaintiff's prior equitable interest over the said property acquired by the plaintiff by way of purchase of the said property from the first defendant prior to the execution and registration of the second defendant's charge.

4 A declaration that as between the plaintiff and the second defendant, any foreclosure action resulting in a sale or otherwise taken by the second defendant over the said property is subject to the plaintiff's prior equitable interest over the said property by payment to the plaintiff of the sum of RM295,000 being the purchase price which the plaintiff paid to the first defendant.

...

7 Costs of this application.

On 25 April 1994, the judge pronounced judgment in favour of the purchaser under the agreement by making orders in terms of all the reliefs prayed for in the originating summons. From that judgment, the finance company chargee had appealed to this court citing the purchaser under the agreement as the sole respondent to the appeal.

We now turn to the grounds of judgment of the court below.

In giving his reasons for decision, the judge had merely echoed the contentions of counsel for the purchaser under the agreement.

The judge began by identifying the three issues which arose for decision before him — and which had been agreed by counsel on both sides — in the following terms:

> Thus the primary issue between plaintiff vis-à-vis second defendant is in respect of Lot No 6, Block A and the three issues agreed between both parties is as recited in para 3 of counsel for second defendants' written submission, which is:
>
> (i) Whether the plaintiff has acquired any beneficial or equitable interest in the said property by virtue of the sale and purchase agreement dated 2 November 1982 and if so, at what point in time?
>
> (ii) Whether the first defendant was the trustee of the plaintiff at the time when the charge was created?
>
> (iii) As between the plaintiff's equitable interest and the second defendant's registered charge, who has priority?

Next, in giving his reasons for decision, the judge began by saying this:

> With respect as in para B1 of plaintiff's counsel's written submission dated 9 April 1994:
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> > 'Ong Hock Sim FJ said in *Temenggong Securities Ltd & Anor v Registrar of Titles & Ors* [1974] 2 MLJ 45 at p 47:
> >
> > > "The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants [the purchasers] are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no *interest* in the lands which can be the subject-matter of a caveat."
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> Sinnadurai in his book entitled '*Sale and Purchase of Real Property In Malaysia*' under the heading '*Conclusion: Position of Parties under Malaysia Law*' at pp 28–30 has this to say:
>
> > 'Therefore even if the vendor fails to surrender the issue document of title and the duly completed transfer documents, with the understanding that these documents will be surrendered at a later date, the vendor still becomes a bare trustee. In such a case the vendor having divested his interest in the land, specific performance is available to the purchaser. It is also further submitted that on the date for completion, if the vendor becomes a bare trustee, it operates retrospectively by conversion to the date when the contract was made.'

A In other words only if a bare trusteeship can be established will the purchaser acquire retrospectively, all the benefits of the vendor's trusteeship. Otherwise, the purchaser's interests are only in contract.

The judge went on to say:

In the present case before me first defendants have received the full purchase
B price from plaintiff on 23 May 1986. Thus upon the doctrine if I may call it 'when a bare trustee operates retrospectively', upon receipt of the full purchase price first defendants became a bare trustee for plaintiffs which operates retrospectively by conversion to the date when the contract was made, ie 2 November 1982.

C And this is what the judge next said:

And with respect as in para 2 of plaintiff's counsel's written submission dated 9 April 1994:

'2 In applying the above quoted principles and the views of the learned author to the present case on the position in Malaysian law, it is
D respectfully submitted that:

2.1 the plaintiff acquires a beneficial or equitable interest in the said property from the time the agreement for the sale and purchase of the said property between the plaintiff and the first defendant was signed on 2 November 1982. The first defendant at this point in time is a 'qualified trustee' for the plaintiff, that is until the purchase
E price is paid in full;

2.2 when the plaintiff pays the balance of the purchase price in full on 23 May 1986, the first defendant on this date thereupon becomes a 'bare trustee' for the plaintiff, and such full trusteeship operates retrospectively by conversion to the date when the contract was made;

F

2.3 so because of the retrospective effect of the trusteeship, the first defendant effectively became the bare trustee of the plaintiff on 2 November 1982 when the contract was made; and

2.4 the first defendant, notwithstanding its failure to surrender the issue document of title and the duly completed transfer documents
G to the plaintiff, it is even more so by reference to exh TBS-3 annexed to the plaintiff's affidavit which clearly evinces the understanding that these documents will be forwarded to the plaintiff.'

And the judge continued:

H And with respect I also agree with para 3 of plaintiff's counsel's written submission dated 9 April 1994:

'3 it is submitted that since the first defendant's memorandum of charge over the project land (which included the said property sold to the plaintiff) in favour of the second defendant was executed on 28 May
I 1983 after the contract between the plaintiff and first defendant dated 2 November 1982, the first defendant by operation of the retrospective trust on completion of the sale by payment of the full purchase price on 23 May 1986 is already a bare trustee of the plaintiff as at 2 November

> 1982 prior to the creation of the charge. Consequently, the plaintiff is entitled to its claim for the declaration sought under prayer (1) of the originating summons ...'

And this is what the judge finally said:

> And with respect I think with plaintiff succeeding as in prayer 1, the other prayers 2, 3, 4 and 7 are merely consequential.

Before us, the primary submission advanced by counsel for the finance company chargee was that the judge had erred in holding, as he did in fact hold, that upon receipt of the full purchase price, the developer chargor had become a bare trustee for the purchaser under the agreement and that the trusteeship 'operates retrospectively by conversion to the date when the contract was made', that is to say in the present case, 2 November 1982, applying the views of Prof Visu Sinnadurai (now Visu Sinnadurai J) in his textbook *Sale and Purchase of Real Property in Malaysia* at pp 218–219.

The preliminary point we should like to deal with is: whether the system of land tenure in Sabah is based upon the Torrens registration system?

Nowhere in the Land Ordinance is there any provision conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of land registration. This is to be contrasted with the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring such indefeasibility. (See ss 92(1) and s 340 of the National Land Code 1965 and s 131 of the Sarawak Land Code (Cap 81) respectively.) Moreover, in Sabah, unlike Peninsular Malaysia and Sarawak, in appropriate circumstances the doctrine of adverse possession may be invoked against private owners of land. (See s 6 of the Sabah Land Ordinance (Cap 68) which merely bars any claim to any right, title or interest in state land only based on adverse possession thereof).

Nevertheless, in *Chua Chee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480, the Supreme Court, speaking through Lee Hun Hoe CJ, said (at p 484) though without discussion:

> In our view, since the Sabah Land Ordinance (Cap 68) and the National Land Code 1965 are modelled on the Torrens system, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah ...

Similarly, in the earlier case of *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200, the old Federal Court, which comprised Thomson LP, Wee Chong Jin CJ (Singapore) and Wylie CJ (Borneo), at a time when our apex court was still the Privy Council, expressed the view that the Land Ordinance provides for a modified Torrens system of land registration. This is how Wylie CJ (Borneo), speaking for the court, put it (at p 206):

> Section 88 of the Land Ordinance reads as follows:
>
> > 'No new title and no dealing with, claim to or interest in any land except, land still held under native customary tenure without

documentary title shall be valid until it has been registered in accordance with the provisions of this Part.'

Part V of the Land Ordinance provides for a modified Torrens system of land registration in Sabah and this section corresponds to the provision necessary in this system to ensure that no title to interests in land shall pass until the dealing has been registered. The language employed is somewhat different from that used in the majority of systems in use in the Commonwealth. The usual provision is to the effect that no instrument shall be effectual to pass any interest in land without registration and that, upon registration, the interest shall pass. See s 27 of the Land Titles Ordinance 1956 of Singapore for an illustration, and also the reference to the number of jurisdictions in which this provision exists set out in p 116 of Hogg's *Registration of Title to Land Throughout the Empire*. In nearly all jurisdictions, however, notwithstanding variations in the language used, it has been held that these provisions do not render unenforceable contracts or agreements which would lead up to the execution and registration of instruments. Even the unregistered instrument itself may give a title in equity and an equitable right to enforce the agreement which must have existed between the parties when the instrument was executed. See *Abigail v Lapin* [1934] AC 491. Section 4 of the Selangor Registration of Titles Regulation 1891 employed what is probably the most sweeping language used in these provisions. That section provided that land comprised in a grant shall not be capable of being dealt with except in accordance with the statutory provisions and that 'any attempt' to deal with land except in this manner 'shall be null and void and of none effect'. Nevertheless, in *Haji Abdul Rahman v Mohamed Hassan* [1917] AC 209; 1 FMSLR 290, the Judicial Committee of the Privy Council held that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while 'valueless as a transfer or burdening instrument' (at p 215) was good as a contract. It was said that it was not an 'attempt to transfer, but a conditional promise to transfer' (at p 214).

The language of s 88 is not nearly as sweeping as that of the Selangor provision. Moreover, its effect is confined to a new title or a dealing with, claim to, or interest in land. Following the foregoing authorities, and others too numerous to mention, in my judgment s 88 does not affect contracts or agreements otherwise valid and enforceable. As was pointed out in *Abigail*'s case (at p 500), the provision for protection of unregistered interests by caveats shows that the legislation does not attempt to render all unregistered interests non-existent. What it does, is to prohibit the acquisition of a legal estate or interest in land except by registration of an instrument in the statutory form. Section 116 of the Land Ordinance of Sabah makes the usual provision for caveats which may be registered 'by any person claiming to be entitled to any interest' in any land. Obviously, such a provision is inconsistent with any interpretation of s 88 which involves holding that any agreements or other documents affecting land are of no effect and that only registration of the dealing in the land is to have legal validity at all.

For these reasons, I hold that s 88, notwithstanding the variation in language from that used in most jurisdictions, does not render this agreement for a lease invalid or unforceable.

Indeed, other considerations apart, the provisions of s 88 make it imperative in my view that there should be an order for specific performance,

> including an order that the respondent execute a registrable memorandum of sublease embodying the terms of the agreement and do all other acts necessary to enable registration to be effected. For, in this agreement she has agreed to let these premises for fifteen years and having regard to the provisions of s 88, the only manner in which the law of Sabah permits her to vest in the appellant the interest she has thus agreed to grant to him is by doing those acts necessary to register the dealing.

With respect, we are unable to agree with Lee Hun Hoe CJ (Borneo) when he said in *Chua Chee Hung* that the Land Ordinance, like the National Land Code, is modelled on the Torrens system. We say so because, unlike the National Land Code, there is no provision in the Land Ordinance conferring indefeasibility of title or interests in land on registration which is a feature of central importance to the Torrens system of land registration.

However, s 88 which emphasizes the paramount importance of registration in accordance with Pt V of the Land Ordinance as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any land (except land still held under native customary tenure without documentary title) does, in our view, imply the basic Torrens concept that title to or interest in land vests and divests only upon registration. Moreover, the provisions of s 116 of the Land Ordinance regarding the role of the caveat in giving notice of claim against the registered title point to the same conclusion. We therefore agree with the view of the old Federal Court, speaking through Wylie CJ (Borneo) in *Lin Nyuk Chan*, that the Sabah Land Ordinance (Cap 68) provides for a modified Torrens system of land registration.

It follows, therefore, that the Peninsular Malaysia cases such as *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 and *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54, with their emphasis on the indefeasibility of the chargee's registered title guaranteed by s 340 of the National Land Code 1965 subject only to the exceptions of fraud or misrepresentation, or where registration has been obtained by forgery or by means of an insufficient or void instrument or where title or interest has been unlawfully acquired, were of no direct relevance to the issues which arose for decision in the present appeal though, of course, the finance company chargee could derive analogical support therefrom.

In our view, the correct approach to adopt in considering the priority dispute in this appeal is to apply general law priority rules, not forgetting s 88 of the Land Ordinance and the concept of the bare trust doctrine in a vendor/purchaser situation.

In the course of the submission by counsel for the purchaser under the agreement, our attention was directed to the judgment of the High Court at Shah Alam in *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* [1995] 3 MLJ 211, wherein it was held (at p 218):

> ... it is clear that after a sale and purchase agreement for the sale of land is concluded, the purchaser under our Malaysian law derives a beneficial ownership to the said land.

In so holding, the court had relied on the familiar dicta of Jessel MR in *Lysaght v Edwards* (1875–76) 2 Ch D 499 at p 506, namely:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; ... It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.

It must not be overlooked that *Lysaght v Edwards* was concerned with an issue arising under a will as a result of a query by the personal representative of a deceased vendor in a case where a conveyance had not yet been executed, there being no dispute between vendor and purchaser.

In our view, to apply the dicta of Jessel MR in unqualified terms in Peninsular Malaysia and in Sarawak, where the Torrens system of registration of title applies; or in Sabah, where the Land Ordinance provides for a modified Torrens system of land registration, would be misplaced. Indeed, in *Chin Choy & Ors v Collector of Stamp Duties* [1981] 2 MLJ 47, the Privy Council, speaking through Lord Roskill though by way of obiter dicta only, expressed reservations on the bare trust concept under the Malaysian Torrens system especially in view of s 6 of the Civil Law Act 1956 (Revised – 1972), which provides:

> Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

This is how Lord Roskill put it (at p 48):

> Much emphasis was laid by learned counsel for the appellant in his argument upon the existence in Malaysia of the Torrens system and upon the differences between that system and conveyancing practice in England. Nonetheless learned counsel also contended that the effect of the agreement of 30 October 1971 was to transfer the equitable title of the property to the appellant notwithstanding that the legal title could only be transferred by registration in accordance with the National Land Code. The respondent was prepared to concede that the equitable title was transferred on that date and in that manner. However, the principle that once a valid contract for sale is concluded the vendor becomes in equity a trustee for the purchaser of the estate sold is a peculiarity of English land law. But s 6 of the Civil Law Ordinance 1956 of the Federation of Malaya expressly provides that nothing in that part of that statute should be taken to introduce into the Federation 'any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein'. It is not, however, necessary for their Lordships further to pronounce upon this question in the present appeal.

Referring to the dicta of Jessel MR aforesaid, in the context of the question whether reliance thereon would be appropriate in Malaysia, Prof Visu Sinnadurai has said this in his book *Sale and Purchase of Real Property* (at p 214):

> One important point to note is that reliance on the dicta of Jessel MR in *Lysaght v Edwards* may not be wholly suitable in countries where the Torrens system of registration is applicable. Much emphasis was placed on the evidence of the vendor's good title by Jessel MR. The problem of the vendor's title is not as acute under the Torrens system as under English law.

We note that in *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 (FC), Gill FJ refused to follow the dicta of Jessel MR and expressed a preference for the dissenting judgment of James LJ in *Rayner v Preston* (1881) 18 Ch D 1, though he took an opposite view in the later case of *Inter-Continental Mining Co Sdn Bhd v Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145.

But, having said that, it is right to say at the risk of being trite, that there has been a consistent current of recent decisions by the Supreme Court applying the concept of the bare trust in a vendor and purchaser situation, though without discussion as to its appropriateness under the Malaysian Torrens system. (See *M & J Frozen Food & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; *Hon Ho Wah & Anor v United Malayan Banking Corp Bhd* [1994] 2 MLJ 393; *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 408; *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; *Chua Chee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480). And in *Yeong Ah Chee v Lee Chong Hai*, the court went so far as to suggest that the concept of the bare trust in a vendor and purchaser situation applied under the Malaysian Torrens system by virtue of the Civil Law Act 1956.

In our view, therefore, it is too late now to question the applicability of the concept of the bare trust in a vendor/purchaser situation in Malaysia, though there is high authority to show that the concept, as enunciated by Jessel MR in *Lysaght v Edwards*, would require to be applied in a modified form, so far as the question when the bare trust will arise is concerned, and it is to this question that we must now direct attention.

The question when the vendor of land becomes a bare trustee for the purchaser in Malaysia has not been uniformly answered by the old Federal Court, in the days when our apex court was the Judicial Committee of the Privy Council and this is reflected in a number of its decisions, to some of which we should now like to refer.

In *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149 (FC), Suffian FJ (as he then was) said (at p 151):

> In my judgment, the company [the vendor] becomes in equity a trustee for the plaintiff [the purchaser] and the beneficial ownership passes to the plaintiff as soon as the purchase price has been paid.

In *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (FC), Ong Hock Sim FJ said (at p 47):

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants [the purchasers] are bare trustees for the appellants of the said land...

This view was not dissented from by the Privy Council when their Lordships dealt with the matter on appeal (see [1976] 2 MLJ 44).

But, in the earlier case of *Ong Chat Pang & Anor v Valiappa Chettiar* [1971] 1 MLJ 224 (FC), Gill FJ took a somewhat different view when he said (at p 229):

> ... the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done *all* that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser. [Emphasis provided.]

Judith Sihombing in her book *National Land Code: A Commentary* (2nd Ed, 1992) at p 801 says that the proprietor has done all that is necessary when he has given the donee a transfer in registrable form and the issue document of title.

In *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 (FC), it was held (at p 119) that a vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in *Ahmad bin Salleh*, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.

We cannot, however, give unqualified approval to the view of Prof Visu Sinnadurai, found at p 219 of his well-regarded book on *Sale and Purchase of Real Property in Malaysia* — which, it will be recalled, was the 'sheet anchor' of the judgment of the court below — that 'on the date of completion, if the vendor becomes a bare trustee, it operates retrospectively by conversion to the date when the contract was made' as this proposition, if applied universally, could cause considerable difficulties in the workings of the Torrens system of registration of title or even a modified Torrens system of land registration — as in Sabah — contained in a codifying enactment. Take this very case, where between the execution of the sale and purchase agreement and completion, the interest of the finance company

chargee had intervened in the circumstances mentioned, so that to transfer into the law of vendor and purchaser, the law governing the rights and duties of trustees, statutory or otherwise, would give rise to considerable difficulties (per Jacobs J in *Chang & Anor v Registrar of Titles* (1976) 8 ALR 285 at p 295).

A further factor which complicates the matter here is the position of the purchaser at the judicial sale, in whose favour a certificate of sale dated 26 February 1992 had been issued *prior* to the pronouncement of judgment on 25 April 1994, in the proceedings by way of originating summons by the purchaser under the agreement, which had been overlooked all round and to which we shall have to revert.

Given these circumstances, no court would grant specific performance of the sale and purchase agreement aforesaid. The trustee/beneficiary relationship will not be applied in a vendor and purchaser situation where the contract of sale and purchase is not one of which a court would grant specific performance. As the Privy Council said on appeal from Canada in *Howard v Miller* [1915] AC 318:

> It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase money, but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract (per Lord Parker of Waddington at p 326).

In the present context, the following passage in Judith Sihombing's book on the National Land Code (lst Ed) at p 570 merits reading:

> If the holder of the unregistered interest can act as if he does hold an interest in land then there is little difference between the general law system and that of Torrens. The immediate result would be uncertainty. It would no longer be possible to rely on a conclusive register and a person intending to deal with land must go behind the register and investigate all transactions entered into by the registered owner. This is the very uncertainty for which the Torrens system was designed to avoid.

To return to *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd*, if we may say so with respect, the High Court at Shah Alam's understanding of the *Peninsular Land Development* case and the then Supreme Court case of *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 and *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 (all of which were binding upon that court) was mistaken and clearly wrong.

In particular, having regard to our views as to when a vendor of land becomes a bare trustee for the purchaser in Malaysia, we would take this opportunity of overruling the proposition of law laid down by the High Court at Shah Alam in *Ahmad bin Salleh* (at p 218) that:

> ... it is clear that after a sale and purchase for the sale of land is *concluded*, the purchaser under our Malaysian law derives a beneficial ownership to the said land. [Emphasis provided]

A Similarly, we would overrule the proposition of law laid down by the High Court at Shah Alam in *Ahmad bin Salleh* (at p 221) that:

> In a contract of sale, the question of whether the defendants are bona fide purchasers is irrelevant where no fraud or misrepresentation exists.

B As this proposition of law involved the interpretation of s 340 of the National Land Code 1965 and in particular, the provisions of the proviso to s 340(3), we would have thought that the 36 words in which that proviso is set out would be quoted in the judgment and their proper construction considered. Such, however, was not the case.

C It follows that in the present case, the judge in the court below had erred in law when he held, as he did in fact hold, that the finance company chargee's charge had been created *after* the developer had become a bare trustee of the purchaser under the agreement and that consequently, the finance company chargee had to take the charge subject to the equitable interest or beneficial interest in the disputed property of the purchaser D under the agreement. This holding is flatly contradicted by the undisputed evidence and the applicable law as we understand it, which showed that at the time when the finance company's charge was created, that is to say, on 28 May 1983, and registered on 21 June 1983, the chargor was not yet a trustee of the purchaser under the agreement. Consequently, any suggestion that the charge thus created was null and void was devoid of any legal E basis.

But, even assuming that completion under the sale and purchase agreement and handing over by the developer chargor to the purchaser under the agreement of a duly executed, valid and registrable transfer of the disputed property to the purchaser under the agreement had preceded F the creation of the charge, it would still have been clearly wrong in law to decide the priority dispute in favour of the purchaser under the agreement To reiterate, although unlike the applicable law in Peninsular Malaysia and Sarawak, in Sabah there is no provision in the Land Ordinance conferring indefeasibility of title or interest in land on registration, yet G Ch V of the Land Ordinance — and especially s 88 — does imply the basic Torrens concept that the title to or interest in land vests and divests only on registration.

That being so, the following proposition enunciated by the Federal Court in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 at p 88, would apply to H Sabah in relation to a charge of land registered under the Land Ordinance:

> ... the doctrine of constructive notice ... is inapplicable ... to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration ... Where the effect of constructive notice would be to invalidate a transaction in relation to the sale of land, the court will not readily apply the doctrine.

I In the present case, nowhere in the affidavits was there even an allegation by the purchaser under the agreement that there had been fraud on the part of the finance company chargee, or collusion between it and the developer chargor, to defeat the interest of the purchaser under the

agreement. Indeed, in creating the charge over the disputed property, the developer chargor was engaged in a transaction of a sort which is regularly encountered in the commercial world and in no way abnormal. A

On a further ground also — not taken up before us — the appeal was bound to succeed. What was overlooked all round was that well *before* the judgment was pronounced on 25 April 1994, the interest of the purchaser at the judicial sale had intervened, there having been already issued the certificate of sale dated 26 February 1992 aforesaid in its favour and it being a purchaser in good faith for valuable consideration and without notice of the circumstances alleged to render the finance company chargee's title defeasible. B

There is a final point which is really a new point — not argued in the court below or before us, but which we had noticed — which needs to be addressed. By s 12 of the Housing (Control and Licensing of Developers) Enactment 1978 of Sabah, it is provided that every contract of sale shall contain a provision binding on the licensed housing developer that immediately after a contract of sale has been signed the developer shall not subject the land sold to the purchaser to any incumberance without the prior approval of the purchaser. This provision is similar to reg 12(1)(b) of the Housing Developers (Control and Licensing) Regulations 1982, applicable to Peninsular Malaysia, previously r 12(1)(b) of the Housing Developers (Control and Licensing) Rules 1970. C D

In the present case, the sale and purchase agreement was executed *before* the charge was created, so s 12 of the Housing (Control and Licensing of Developers) Enactment 1978 of Sabah would be relevant. We note that the sale and purchase agreement did not include the mandatory provisions of s 12. We are aware that in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457, where the agreement of sale and purchase not only failed to include the mandatory clause provided for in r 12(1)(b) of the Housing Developers (Control and Licensing) Rules 1970 but in fact contained, by cl 3, a provision which flatly contradicted it and which was unlawful and of no effect, the Privy Council had expressed the view that, prima facie, there was a strong arguable ground for contending that a provision which seeks to circumvent a mandatory clause by imposing on the purchaser a blanket approval upon the signature of the contract cannot be effective. Their Lordships went on to express the view that there was an arguable case that a charge, in the absence of express approval by the individual purchasers, would have been created by the chargor — who was an unlicensed developer — without the authority of the purchasers of whose interests the chargee had express notice, might be tainted with illegality, thus rendering the charge unenforceable. E F G H

In the present case, however, it would be wrong to assume that had the purchaser under the agreement advanced a submission based on s 12 of the Housing (Control and Licensing of Developers) Enactment of Sabah in the court below, it was bound to have succeeded. Certainly, had it done so, most probably the evidence would not have been the same. For I

instance, evidence might have been led in the court below to show that at the material time, the finance company chargee was not aware that the project lands or any part thereof were the subject of sale and purchase agreements or, if it was aware, evidence might have been led to show that the purchasers had given their prior approval to the creation of the charge. Similarly, assuming there had been any allegation by the purchaser under the agreement of fraud or collusion on the part of the finance company chargee and the developer chargor, evidence might have been led to rebut the same.

We should add that in law, there is no requirement that prior to the creation of a charge over land which is intended for development and sub-divided into lots for sale to the public, a chargee is under an obligation to ascertain that the lots have not been sold or that they are not the subject of sale and purchase agreements executed by a chargor as vendor. It goes without saying that it behoves a chargee to do so but — we hasten to add — such an omission, even though it might constitute negligence, would not constitute fraud within s 340(2)(a) of the National Land Code 1965. (See *Lai Soon Cheong v Kien Loong Housing Development Sdn Bhd & Anor* [1993] 2 CLJ 199).

In all the circumstances, we felt bound to hold that the interest of the finance company chargee must prevail. (See *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481).

In the result, we had no hesitation in unanimously allowing the appeal with costs here and below, setting aside the judgment of the court below and answering the question of priority which arose for decision in favour of the finance company chargee. The orders made by the Assistant Collector of Revenue, Kota Kinabalu were accordingly restored and the sale to the purchaser at the judicial sale affirmed. The deposit paid into court by way of security for costs was ordered to be refunded.

Order accordingly.

Reported by Choo Siew Ling